

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 23, 2006 Session

MARK A. NOBLIN v. CHAD P. CHRISTIANSEN, ET AL.

**Appeal from the Circuit Court for Rutherford County
No. 49858 Royce Taylor, Judge**

No. M2005-01316-COA-R3-CV - Filed on May 30, 2007

Defendant appeals the trial court's finding that he breached an oral contract to develop a residential project and committed fraud. The parties presented different versions of their arrangement, and the trial court found the defendant lacked credibility. The evidence supports the trial court's determination that the parties had an oral agreement to build a house on a residential lot and split the profits. The trial court's holding that the defendant committed fraudulent acts to deprive the plaintiff of his interest in the property is also supported by the evidence. We affirm.

**Tenn. R. App. P. 3 appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Frank M. Fly, James Bryan Moseley, Murfreesboro, Tennessee, for the appellant, Chad P. Christiansen, d/b/a Chadwick Homes, a/k/a Chadwick Prater Homes.

D. Russell Thomas, Herbert M. Schaltegger, Murfreesboro, Tennessee, for the appellee, Mark A. Noblin.

OPINION

This case involves claims by the plaintiff, Mark Noblin, for breach of contract and fraud arising from a business relationship between Mr. Noblin and the defendant, Chad Christiansen, relating to the development of a piece of real property, a residential lot. The primary questions at trial were (1) whether the two parties had an oral agreement to develop that piece of property and share the obligations and resulting profits and (2) whether Mr. Christiansen defrauded Mr. Noblin of his share of the eventual profits.

Beginning in the summer of 2002, Mr. Noblin and Mr. Christiansen had various business dealings with each other. The arrangement that is the subject of this appeal centers on one particular

piece of property and the house constructed thereon, referred to by the parties as Lot 1, Anatole (“Lot 1” or “Property”). According to Mr. Noblin, he and Mr. Christiansen had an oral agreement to build a house on Lot 1, sell the property, and share profits and liabilities equally. Mr. Christiansen, on the other hand, maintained that Lot 1 was included in an employment arrangement between Mr. Noblin and one of Mr. Christiansen’s companies under which Mr. Noblin supervised the construction of a number of houses. Mr. Noblin maintained that Lot 1 was not part of the employment arrangement but was covered by a separate agreement.

I. FACTS

For fourteen years, Mark Noblin had a business renovating, re-selling, and renting houses. After having renovated and sold fifty to sixty such properties, Mr. Noblin became interested in transitioning to building new homes. In the summer of 2002, he met with Chad Christiansen, who already had an established company that built new homes, and a mutual acquaintance, John Anderson,¹ who had subcontracting experience, to discuss combining their resources to construct at least one house, and maybe more. Mr. Noblin and Mr. Christiansen continued discussions for a while.

In August of 2002, Mr. Noblin obtained for \$500 in earnest money a contract to purchase Lot 1 from Dr. Warren Langworthy. Mr. Noblin and Dr. Langworthy signed a document labeled “Contract for Sale.” No one denies that Mr. Noblin’s name originally appeared as the buyer on the Contract or that Mr. Noblin’s \$500 check was cashed by Dr. Langworthy.

After a meeting between Mr. Noblin and Mr. Christiansen, the parties agreed to develop Lot 1. On September 4, 2002, one day before Lot 1 was to close, Mr. Christiansen and Mr. Noblin met with Mark Moore, a local attorney, to put their agreement concerning Lot 1 in writing. According to Mr. Noblin, that agreement was that he would provide the Property, oversee the construction, and provide substantial labor, while Mr. Christiansen would share his experience, provide access to subcontractors, and furnish the project’s financing and accounting;² after the property was developed and sold, they would split the profits or losses fifty-fifty.

A number of people were aware of the proposed arrangement and Mr. Noblin’s ownership interest in the property. In addition, Mr. Christiansen told his bookkeeper that he and Mr. Noblin were partners on the Lot 1 development and that Mr. Noblin was to have access to financial information on that project. Although the attorney drafted an agreement, it was never executed. Mr. Noblin maintains that the draft accurately reflects the terms of the parties’ oral agreement. Mr. Christiansen points out that the draft agreement reflects that Mr. Noblin was to be an independent

¹ As things developed, Mr. Anderson, without being consulted, was not included in the arrangement. Apparently both Mr. Anderson and Mr. Noblin found out that the deal had changed after Mr. Christiansen unilaterally made the decision to exclude Mr. Anderson from the project.

² Mr. Noblin testified that he had secured credit for development of Lot 1, but that Mr. Christiansen assured him that he already had established lines of credit that would be sufficient for the project.

contractor, not a partner. Nonetheless, it is clear that, at least as of their meeting with Mr. Moore, Mr. Noblin and Mr. Christiansen intended to enter into a contractual relationship concerning Lot 1 in which they would share profits and liabilities.

Mr. Noblin claims that throughout the construction process on Lot 1, he repeatedly inquired about the status of the written contract evidencing the parties' agreement as to Lot 1. He testified that Mr. Christiansen led him to believe that the contract was not ready but would be forthcoming. The attorney, Mr. Moore, for his part, testified that within several days to a week after meeting with Mr. Christiansen and Mr. Noblin, Mr. Christiansen informed him that they no longer needed the agreement. Mr. Moore did not communicate this to Mr. Noblin. Mr. Christiansen admitted that he told Mr. Moore to cancel preparation of the agreement, but maintained that the agreement was never signed because it was moot since the parties' arrangement had changed.

On September 5, 2002, one day after meeting with Mr. Moore, the sale of the property to which Mr. Noblin had purchased the rights, Lot 1, was closed in the name of Chadwick Christiansen d/b/a Chadwick Homes. Mr. Noblin was unable to attend the closing.

The "Contract for Sale" between Dr. Langworthy and Mr. Noblin, which evidenced Mr. Noblin's right to purchase the property, was altered before the closing. The contract produced at the closing on Lot 1 was entered into evidence³ and, instead of Mr. Noblin's name as the purchaser, the name of Mr. Christianson's business, "Chadwick Homes" appeared. An expert retained by Mr. Noblin testified that the "Contract for Sale" between Mr. Noblin and Dr. Langworthy appeared to have been altered in the area where Mr. Noblin's name originally appeared and where the name "Chadwick Homes" now appeared.⁴

In his complaint, Mr. Noblin stated that "at closing, the property was put into Defendant's name so that Defendant could arrange financing as required by the Contract [between Mr. Noblin and Mr. Christiansen]." Mr. Noblin asserts that in anticipation of execution of the written agreement between himself and Mr. Christiansen, and in view of the contract placing responsibility for financing on Mr. Christiansen, he permitted Mr. Christiansen to execute the purchase documents at closing as the buyer. Mr. Noblin admits he knew that Lot 1 had not closed in his name, but thought that it had closed in the name of the partnership or joint venture between himself and Mr.

³The original contract as executed by Mr. Noblin and Dr. Langworthy was no longer available for introduction or for inspection by the document expert. Mr. Noblin testified that he gave Mr. Christiansen his file on the property. The contract he had used was one of his boilerplate forms prepared on his computer. He testified that his usual practice when buying property was to print additional copies of the blank agreement to take to meetings with sellers. At trial, the blank, "clean" document was entered into evidence alongside the same document that the court found to have been altered.

⁴Evidence that the document was altered so that "Chadwick Homes" appears where it once read "Mark Noblin and Partners" includes (1) partially obscured/missing formatting lines that appear on the "clean" copy, (2) white smudges on adjoining words suggesting use of white-out, (3) that the signatures are initialed, (4) inconsistent dates on the first and last pages, and (5) Mr. Noblin and Dr. Langworthy's testimony that the original contract was between them, not Mr. Christiansen or Chadwick Homes.

Christiansen and for which he assumed a written agreement was being prepared. He testified that he never intended to give up his entire ownership interest in Lot 1 to Mr. Christiansen.

The day after the closing, September 6, 2002, Mr. Noblin and various subcontractors began work on the placement and foundation of the Lot 1 house. Mr. Noblin testified he was at the site of Lot 1 “religiously.” He says he had access to and checked the spending logs, always trying to get the best price so that he could maximize profit because this was “my house.”

During the same time period, Mr. Christiansen’s company was building a number of houses that were in various stages of construction. Within a month after construction began on Lot 1, probably on September 16 or 17, 2002,⁵ Mr. Christiansen hired Mr. Noblin, at a salary of \$60,000 per year, to work for Chadwick Homes as a construction supervisor on twenty-two houses the company was building. At that point, construction had been going on at Lot 1, although there is some dispute as to how much had been done before Mr. Noblin was hired.

In this lawsuit Mr. Christiansen maintained that Lot 1 was included in the employment arrangement that covered the other houses being built by his company. Mr. Noblin maintained that Lot 1 was not part of the later employment arrangement but was covered by the separate agreement to develop Lot 1 and split the profits.

At some point, Mr. Noblin briefly “tendered his resignation” as construction supervisor, but he returned to work for Chadwick Homes two days later. Mr. Noblin testified that during this “resignation” period, he still made phone calls about Lot 1 and visited it in the evenings.

Four or five months into construction on Lot 1, after months of waiting for the partnership agreement and asking Mr. Christiansen to provide it only to be repeatedly rebuffed or, as he described it, strung-along, Mr. Noblin says he asked Mr. Moore about the agreement and was told that when two people go into business together for profit, it is “automatically” considered a partnership. Mr. Noblin says that, having learned this information, he thought his interests were protected and did not pursue the written agreement further. Mr. Moore says that he does not remember giving such advice and likely would have advised Mr. Noblin to seek independent counsel because he had previously done other legal work for both Mr. Noblin and Mr. Christiansen.

Around May 1, 2003, shortly after the house on Lot 1 was completed, Mr. Christiansen moved into it. He told Mr. Noblin that he had closed on another house and would be moving into

⁵Mr. Noblin, in his affidavit, said he was hired on October 10, 2002, (the same date in the bookkeeper’s testimony, but no source was given for this date), but in his trial testimony, he says he was hired September 16 or 17, which seems more likely, since he made a point of saying that his first paycheck should have been paid on the 30th, but was late. Mr. Noblin received his first and only paycheck from Chadwick Homes on October 21, 2002, in the amount of \$2083.33, in addition to \$1727.35 as reimbursement for items purchased for *several* properties for Chadwick Homes. In late October 2002, Mr. Christiansen formed a partnership with Chad Brock called CMB. Thereafter CMB assumed responsibility for paying Mr. Noblin’s salary.

that house soon. At that point, Mr. Noblin did not object to Mr. Christiansen living in the house because, Mr. Noblin explained, he thought it would only be a temporary situation.

However, Mr. Christiansen took the house off the market about a month after he moved in, without Mr. Noblin's permission. Mr. Christiansen lived in the house for approximately seven or eight months. During this time, Mr. Christiansen refinanced Lot 1. Having previously been financed by construction financing, the house was at that time refinanced with a mortgage, and a Deed of Trust signed by Mr. Christiansen and his wife to the mortgagee was recorded. The house was subsequently rented by Mr. Christiansen (or the Christiansens) for thirteen months to a third party. Mr. Noblin did not agree to this rental and did not receive any of the rent.

In September 2003, Mr. Noblin was terminated from CMB and Chadwick Homes and applied for unemployment benefits.

In March of 2004, Mr. Noblin initiated this lawsuit. At that time, the house on Lot 1 had not been sold, and Mr. Noblin wanted to establish his rights to the property and any profits from its sale since Mr. Christiansen had exercised sole control over the house since its completion, had refused to provide an accounting to Mr. Noblin, and was claiming that he owed Mr. Noblin nothing and/or denying the parties had an agreement that would have given Mr. Noblin an interest in the house or its profits.

On February 5, 2005, Mr. Christiansen sold the house and property on Lot 1 for \$380,000. Although the house sold for a profit, the amount of profit is disputed by the parties.

II. COURT PROCEEDINGS

Mr. Noblin brought suit against Chad Christiansen d/b/a Chadwick Homes a/k/a Chadwick Prater Homes (collectively referred to as "Chad Christiansen"). Mr. Noblin alleged Mr. Christiansen did not honor their agreement to sell the house on Lot 1 and equally divide the profits between them. He also alleged that Mr. Christiansen had entered into the oral agreement with Mr. Noblin with no intention of honoring his obligations; made false statements when he asked to temporarily occupy the house after completion; had permitted or caused additional encumbrances to be placed on the title to Mr. Noblin's detriment; and made additional improvements without Mr. Noblin's acquiescence. Mr. Noblin alleged he feared the house would be sold without his interest being protected. The complaint also stated:

Plaintiff avers he is entitled to recover under several different legal doctrines which include but are not limited to breach of express verbal contract, negligent misrepresentation, intentional misrepresentation, fraud, promises made without intent to perform, partnership, joint venture, he is entitled to a mechanics lien.

Mr. Christiansen maintained at trial that the arrangement between the parties on Lot 1 was the same as on the other twenty-two residential lots under development, *i.e.*, Mr. Noblin acted as a salaried supervisor of construction and was not entitled to half the profits on Lot 1.

After a two day bench trial, the trial court found in favor of Mr. Noblin and awarded him compensatory damages of \$70,296.41⁶ and punitive damages of \$87,000.00. As explained in a letter opinion, the court based its ruling “almost entirely” on the credibility of the witnesses and found that Mr. Christiansen “had none.”

Although not specifically stating it, the trial court clearly found that Mr. Noblin and Mr. Christiansen had an agreement to split the profits equally on Lot 1. The court rejected Mr. Christiansen’s assertion that Mr. Noblin was only an employee working on the house on Lot 1, as he was on the other twenty-two houses Mr. Christiansen’s company was building. The court wrote that Mr. Christiansen’s assertion that Lot 1 Anatole was no different from the other twenty-two houses under construction ignored the fact that Mr. Noblin’s consent was required even to build the house because it was Mr. Noblin who “owned the contract to purchase the lot.”

Additionally, the trial court specifically found that after the purchase of Lot 1 closed, Mr. Christianson told his attorney to cease work on the written contract to be executed by Mr. Noblin and Mr. Christiansen committing their agreement to writing. At the same time Mr. Christiansen “continued to lead Mr. Noblin to believe that the agreement was being revised and reworked.”⁷ Further, the court wrote, “Mr. Noblin allowed Mr. Christiansen to take the contract to closing . . . with the understanding that the property would be conveyed to a partnership. . . . Mr. Noblin’s understanding was that the property would not be transferred to him, but to the partnership. . . . Mr. Noblin and Mr. Christiansen had met with attorney Mark Moore and requested that he draft a partnership agreement.” The court did not find it significant that Mr. Noblin knew the property had not closed in his name because, at the time of the closing, “Mr. Noblin had every reason to believe that he had an agreement to split the profits, 50/50 on Lot 1 Anatole.”⁸

The trial court also found that the contract for sale between Mr. Noblin and Dr. Langworthy had been altered; that the purchase was closed solely in Mr. Christiansen’s name; and that Mr. Christiansen had paid no consideration for any assignment of the right to purchase the lot. The court found that Mr. Christiansen “had the property closed in his name with an altered contract” and concluded that Mr. Christiansen’s actions were “clearly fraudulent.”

⁶Originally, the court calculated the one-half profit at \$79,796.41, but upon motion of Mr. Christiansen, the damages were reduced to \$70,296.41 to reflect various expenses incurred in the closing process (real estate commission, settlement charges, document preparation, and notice of completion).

⁷As to Mr. Noblin’s being strung along about the execution of the written agreement between the parties, the trial court found that after the closing “Mr. Noblin obviously had more pressing concerns with the construction of 23 homes than the administration of a partnership agreement.”

⁸These findings were addressed to Mr. Christiansen’s emphasis on the fact that Mr. Noblin knew that the property had not closed in his name.

The trial court awarded Mr. Noblin compensatory damages of \$70,296.40 representing one-half of the profits realized from the house after certain expenses. Based on clear and convincing evidence, the trial court found Mr. Noblin was entitled to punitive damages. The trial court awarded Mr. Noblin \$87,000 in punitive damages which represents Mr. Christiansen's profit and "adds a small level of punishment as well."

III. STANDARD OF REVIEW

Because this case was tried by the court sitting without a jury, we review the trial court's findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Blair v. Brownson*, 197 S.W.3d 681, 684 (Tenn. 2006). Questions of law are reviewed *de novo* with no presumption of correctness. *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006).

Mr. Christiansen's credibility was central to the trial court's findings. In its letter to the parties explaining its decision, the court wrote: "This case is decided almost entirely upon the credibility of the witnesses. The court finds that the defendant, Chad Christiansen, had none."

Where the trial court has seen and heard witnesses, its judgment regarding their credibility and the weight to be given their testimony is accorded considerable deference on appeal. *Clark v. Nashville Machine Elevator Co. Inc.*, 129 S.W.3d 42, 46 (Tenn. 2004); *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999); *Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989).

Conflicts in testimony require the trial court to determine the relative credibility of the testifying witnesses. *Fielder v. Lakesite Enterprises*, 871 S.W.2d 157, 160 (Tenn. Ct. App. 1993). In weighing the preponderance of the evidence, great weight is afforded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *Jones v. Garrett*, 92 S.W.2d 835, 839 (Tenn. 2002). When reviewing factual findings based on credibility we must give considerable deference to the trial courts, because they are in a far better position to observe the demeanor of witnesses than are the appeals courts. *McCaleb v. Saturn Corp.*, 910 S.W. 412, 415 (Tenn. 1995); *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000).

IV. THE AGREEMENT

On the breach of contract claim, the central issue in this case was whether the parties had an oral agreement to jointly develop Lot 1 and to share in any profits or losses. This question is primarily one of fact. Mr. Christiansen's position at trial was that Mr. Noblin was an employee who supervised the construction of the Lot 1 house as well as twenty-two other houses. The trial court rejected that argument.

Based on the record before us, we agree with the trial court. Mr. Noblin originally owned the right to purchase the lot. Construction was begun on Lot 1 before Mr. Noblin began work for

Mr. Christiansen's company, and Mr. Christiansen had told his bookkeeper that Mr. Noblin was a partner on the Lot 1 project. Mr. Noblin had access to the books regarding Lot 1, but not the other 22 houses. Subcontractors testified he always wanted the best price for "his house." The evidence, including these facts, supports the trial court's conclusion that the Lot 1 house was not included in the employment arrangement.

That conclusion leads necessarily to the conclusion that the parties had a different arrangement regarding Lot 1. The question, then, is the nature of this separate arrangement. Implicitly, the trial court found that the parties had an oral agreement to develop Lot 1 and share any resulting profits. Mr. Noblin continued to testify that the unsigned draft prepared by Mr. Moore accurately reflected the terms of the parties' oral agreement. Our review of the entire record supports a finding that there was an agreement to develop Lot 1 and split the profits equally.

In this appeal, several of Mr. Christiansen's arguments center on his contention that the arrangement contemplated in the unsigned agreement was not a partnership because it did not meet the legal requirements for a partnership, primarily co-ownership. Mr. Christiansen asserts that Mr. Noblin alleged in his complaint that the parties had formed an oral partnership. To the contrary, the complaint alleges a breach of oral contract. Mr. Christiansen asserts that the trial court should have granted his motion for partial summary judgment as to the existence of a partnership.⁹ However, he further asserts that if the motion had been granted, "the case should have proceeded towards a determination on what the true agreement was between the parties, because it certainly was not a partnership."

That is what happened here. A trial was held on whether the parties had an oral agreement to develop the property and split the profits, and the trial court determined that such an agreement existed. Consequently, we find Mr. Christiansen's arguments about the legal requirements for a partnership to be irrelevant.

The parties agreed to commit their individual resources, assets, and labor to the joint endeavor. For resolution of the dispute before us, it does not matter who agreed to contribute what; it does not matter who had final say over various aspects of the project; and it does not matter whether their arrangement could be characterized as a partnership, a joint venture, or something else.¹⁰ The determinative fact is that an agreement existed.

⁹We note that it is well-settled that "[a] trial court's denial of a motion for summary judgment, predicated upon the existence of a genuine issue of material fact, is not reviewable on appeal when a judgment is subsequently rendered after a trial on the merits." *Bradford v. City of Clarksville*, 885 S.W.2d 78, 80 (Tenn. Ct. App. 1994); *see also Hobson v. First State Bank*, 777 S.W.2d 24, 32 (Tenn. Ct. App. 1989); *Mullins v. Precision Rubber Prods. Corp.*, 671 S.W.2d 496, 498 (Tenn. Ct. App. 1984); *Tate v. County of Monroe*, 578 S.W.2d 642, 644 (Tenn. Ct. App. 1978).

¹⁰The arrangement herein could be found to constitute a partnership or a joint venture. *See Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991); *Messer Griesheim v Indus.v. Cryotech of Kingsport*, 45 S.W.3d 588, 605-06 (Tenn. Ct. App. 2001); *Schnider v. Carlisle Corp.*, 65 S.W.3d 619 (Tenn. Ct. App. 2001); *Smithson v. White*, No. 87-380-II, 1988 WL 42645 (Tenn. Ct. App. May 4, 1988).

On appeal, Mr. Christiansen makes much of the fact that Mr. Noblin believed that the arrangement entered into by the parties made him a “partner” with Mr. Christiansen.¹¹ It is of no consequence how Mr. Noblin described their agreement. The trial court found that the parties entered into an oral agreement and the terms of the oral agreement entitled Mr. Noblin to one-half of the profits from the development of Lot 1.

It is important to note that Mr. Christiansen has not challenged the trial court’s finding of the existence of their agreement and its terms. Based on the record before us, we affirm the trial court’s determination that the parties had an agreement to develop Lot 1 and split the profits.

V. EVIDENTIARY RULING

Mr. Christiansen also objects to part of the testimony of Felisa Bill, Mr. Christiansen’s bookkeeper. In essence, she contradicted Mr. Christiansen’s position that Lot 1 was included as one of the houses whose construction Mr. Noblin was employed to oversee. She testified on direct examination that Mr. Noblin had a special relationship with Lot 1 Anatole that was different from the other properties he superintended for Mr. Christiansen. It is not this part of her testimony that Mr. Christiansen now objects to.

In its letter opinion, the trial court stated:

Mr. Christiansen also attempted to show that all corroborating witnesses for Mr. Noblin were somehow biased against him. None of the witnesses had any evident bias except for Mr. Brock who, although he was credible, has a lawsuit pending against Mr. Christiansen. Particularly telling was the testimony of Felisa Bill who had every reason not to testify against Mr. Christiansen. They had been friends since childhood, he had given her a job and their mothers remain friends. She was certainly not biased, but did understand right from wrong.

Mr. Christiansen argues that the trial court erred when it permitted Ms. Bill’s testimony to stray to matters concerning other lawsuits involving Mr. Christiansen. Specifically, the testimony objected to concerns Mr. Noblin’s re-direct of Ms. Bill in which she was asked about her role as bookkeeper for both Mr. Christiansen’s business and CMB, Mr. Christiansen’s partnership with Chad Brock who is a plaintiff against Mr. Christiansen in another lawsuit. According to Mr. Christiansen, her testimony was unfairly prejudicial and irrelevant to the case that was being tried.

Mr. Noblin’s counsel asked Ms. Bill about large sums of unaccounted for money. When Mr. Christiansen’s counsel objected, counsel for Mr. Noblin claimed that Mr. Christiansen’s testimony

¹¹ He also argues that testimony from other lay witnesses describing the arrangement as a partnership or the parties as partners was insufficient to establish that a partnership existed since they had no knowledge of the legal requirements for a partnership. The fact that the witnesses and Mr. Noblin used the terms partner and partnership has no significance. They simply used the terms in common usage to distinguish the relationship between the parties from that of employer-employee, which was Mr. Christiansen’s description of the arrangement.

had “opened the door” to such questioning by implying that Ms. Bill was biased. The court responded, “Well, he opened the door on her bias, and I think you’ve got a right to come back to that. Obviously, there needs to be some limits on it. I’m not sure how far we need to go in that regard.” Later, after another objection, the judge allowed the questioning to continue, finding it “goes to whether or not she’s biased.”

Although it is not clear that Ms. Bill’s testimony strayed from relevant matters, even if we assume that it was in error for the court to allow Ms. Bill’s testimony to hint at Mr. Christiansen’s other legal disputes, we believe that, given the rest of the evidence, any error was harmless.¹²

Further, “[i]n Tennessee, decisions regarding the admissibility of evidence rest within the sound discretion of the trial court. Upon review of the trial court’s decision to admit or exclude evidence, we recognize that “trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion.” *Danny L. Davis Contractors, Inc. v. Hobbs*, 157 S.W.3d 414, 419 (Tenn. Ct. App. 2004). “The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives.” *Id.* We find that allowing Ms. Bill’s testimony regarding Mr. Christiansen’s business relationship with another person was within the trial court’s properly exercised discretion.

VI. THE FINDING OF FRAUD

Mr. Christiansen argues that the trial court erred in finding by clear and convincing evidence that he had committed fraud. The trial court found that Mr. Christiansen made promises to Mr. Noblin in order to acquire Lot 1, *i.e.*, that they would share any profits, yet proceeded to acquire the property solely in his name and totally disavowed the agreement he made with Mr. Noblin after he had secured Lot 1. The trial court found this behavior of Mr. Christiansen was “clearly fraudulent.” Mr. Christiansen challenges this finding on appeal. In his Amended Complaint, Mr. Noblin sought to recover for both fraud and promissory fraud.

In order to prove fraud, the misrepresentation must be about an existing fact. When a party intentionally misrepresents a material fact or produces a false impression in order to mislead another or to obtain an undue advantage over him, there is a positive fraud. The representation must have been made with knowledge of its falsity and with a fraudulent intent. The representation must have been about an existing fact which is material, and the plaintiff must have reasonably relied upon that

¹²Rule 103(a)(1) of the Tennessee Rules of Evidence distinguishes between errors which go to a substantial right and those which are harmless (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .”) and Rule 36(b) of the Tennessee Rules of Appellate Procedure deals with the effect of an error (“A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.”).

representation to his injury. *Godwin Aircraft, Inc. v. Houston*, 851 S.W.2d 816, 821 (Tenn. Ct. App. 1992), quoting *Haynes v. Cumberland Builders*, 546 S.W.2d 228, 231 (Tenn. Ct. App. 1976).

Tennessee courts also recognize the tort of promissory fraud when the misrepresentation is not of existing facts. *Oak Ridge Precision Indus., Inc. v. First Tennessee Bank Nat'l Ass'n.*, 835 S.W.2d 25, 29 n. 1 (Tenn. Ct. App. 1992); *Steed Realty v. Oveisi*, 823 S.W.2d 195, 199 (Tenn. Ct. App. 1991). Under promissory fraud, the misrepresentation need not relate solely to existing facts to be fraudulent, but may include future promises. *Steed Realty*, 823 S.W.2d at 199. Actionable fraud can also be based upon a promise of future conduct, so long as it is established that such a promise or representation was made with the intent not to perform. *Id.* (quoting *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 499 (Tenn. 1978)).

The trial court herein found, in effect, that Mr. Christensen entered into an agreement with Mr. Noblin to split the profits on Lot 1 that he never intended to honor in order to acquire Mr. Noblin's rights to Lot 1. This amounts to a finding of promissory fraud.

In order to prove promissory fraud, a plaintiff must prove (1) a promise of future conduct, (2) that was material, (3) made with the intent not to perform, (4) that plaintiff reasonably relied upon (5) to plaintiff's injury. See *Happy Goodman Family*, 575 S.W.2d at 499. Obviously, the most difficult element of this tort concerns the intent not to perform. The statement of intent must be false and not actually held. *Id.*

The question arises how does a plaintiff prove that defendant never intended to comply with his or her promise or agreement. Simply proving nonperformance of the promise does not prove that the intent not to perform originally existed. *Happy Goodman Family*, 575 S.W.2d at 499 n.3. Furthermore, nonperformance does not shift the burden to defendant to show how intervening events prevented performance. *Happy Goodman Family*, 575 S.W.2d at 599 n.3.

The subjective surmise or impression of the plaintiff does not prove defendant had no intent to perform. *Happy Goodman Family*, 575 S.W.2d at 599; *Oak Ridge Precision Indus.*, 835 S.W.2d at 29 n.2; *Farmers & Merchants Bank v. Petty*, 664 S.W.2d 77, 81 (Tenn. Ct. App. 1983). In his concurring opinion in *Farmers & Merchants Bank*, Judge Conner believed the majority opinion found that "the supreme court has indicated an unwillingness to apply the doctrine except in those cases where there is direct proof of a misrepresentation of actual *present* intention." *Farmers & Merchants Bank*, 664 S.W.2d at 82 (emphasis original). See *Kandel Center for Urological Treatment and Research*, No. M2000-02128-COA-R3-CV, 2002 WL 598567, at *8 (Tenn. Ct. App. April 17, 2002) (No Tenn. R. App. P. 11 application filed).

This court in *American Cable Corp. v. ACI Management Inc.*, No. M1997-00280-COA-R3-CV, 2000 WL 1291265, (Tenn. Ct. App. Sept. 14, 2000) (No Tenn. R. App. P. 11 application filed), discussed at length the difficulty of proving intent and held that the best gauge to determine intent, short of an admission, is to examine actions.

Getting at a person's intent can be a tricky proposition, made no less difficult because intent and action are usually separated in time and because intentions are sometimes only imperfectly carried into action. Actions are only crude gauges of the intent behind them, but they are frequently the only gauges available. In addition, people can sometimes be less than candid about their intentions or motives. Thus, judges and juries, lacking the ability to look into a person's mind, are left to deduce a person's intent from his or her actions or from other circumstantial evidence. *State v. Washington*, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983); *Burns v. State*, 591 S.W.2d 780, 784 (Tenn. Crim. App. 1979).

As in other cases where intent is an issue, a party may prove an intent to defraud using conduct or other circumstantial evidence. *Metropolitan Life Ins. Co. v. Hedgepath*, 182 Tenn. 296, 300, 185 S.W.2d 906, 907 (1945). However, proving fraudulent intent, like pleading fraud, is particularly demanding. Outside of cases involving fiduciary relationships, fraud can never be presumed. *In re Ashley*, 5 B.R. 262, 266 (Bankr. E.D. Tenn. 1980); *Snapp v. Moore*, 2 Tenn. (2 Overt.) 236, 239 (1814); *Hiller v. Hailey*, 915 S.W.2d 800, 803 (Tenn. Ct. App. 1995). This rule is part of the law's larger, overarching view that where the same set of circumstances can give rise to opposite inferences, the law presumes innocent acts rather than intentional misconduct. *Memphis Cotton Press & Storage Co. v. Hanson*, 4 Tenn. App. 293, 301 (1926). Thus, no inference of fraud should be made from circumstances that equally permit reasonable inferences of non-fraudulent conduct. *In re Homer*, 45 B.R. 15, 22 (Bankr. W.D. Mo. 1984).

Failure to perform a promise, standing alone, is not competent evidence that the promisor never intended to perform. *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 670 (Tex. Ct. App. 1998). In the context of a promissory fraud claim, the mere fact that the promisor failed to perform the promised act is insufficient by itself to prove fraudulent intent. *Bryant v. Southern Energy Homes, Inc.*, 682 So.2d 3, 5 (Ala. 1996) (affirming summary judgment); *see also In re Emery*, 52 B.R. 68, 70 (Bankr. E.D. Pa. 1985). The reason is that ordinarily, where nothing else is shown, mere failure to perform a promise can be as consistent with an honest intent as with a dishonest one. *Murphy v. T.B. O'Toole, Inc.*, 87 A.2d 637, 638 (Del. Super. Ct. 1952). Not every broken promise starts with a lie.

2002 WL 1291265, *4-5.¹³

¹³The court in *Eddings v. Sears Roebuck & Co.* disagreed with the *American Cable* decision and decided that direct proof was necessary to prove lack of intent to perform. No. W2001-01107-COA-R3-CV, 2002 WL 1592540, at *5-6 (Tenn. Ct. App. Dec. 16, 2002), *perm. app. denied* (Dec. 16, 2002). Circumstantial evidence from which a reasonable person could infer that the promisor lacked intent to perform was found in *Eddings* to be insufficient proof. *Id.* The court in *Eddings*, however, provided no guidance on how such direct evidence of intent could be established.

Whether the defendant has the present intent not to comply with a promise is a question of fact. *Ray v. Williams*, No. W2000-03000-COA-R3-CV, 2002 WL 974671, at *3 (Tenn. Ct. App. May 9, 2002) (No Tenn. R. App. P. 11 application filed). It is critical that plaintiff establish “through competent evidence that the promise of future conduct was made with an intent not to perform.” *Ray v. Williams*, 2002 WL 974671, at *4. See *Steed Realty*, 823 S.W.2d at 199-200.

We agree with this court’s rationale in *American Cable* regarding proof of intent. The Supreme Court in *Happy Goodman Family* simply held that an opinion was not proof of intent and that failure to comply alone was not sufficient to establish an original intent not to comply. Beyond that, the Supreme Court in *Happy Goodman Family* was silent. In order to determine intent, we find that it can be deduced from a promisor’s actions and other circumstantial evidence. If we took an opposite position, it is difficult to imagine direct proof of intent unless there was an outright admission that the promise was made without intent to comply.

The next question is what is the standard of proof applicable to a claim of promissory fraud. When a claimant is alleging the tort of fraud in an action for damages, the claimant is obligated to meet a preponderance of the evidence burden of proof. *Jarmakowicz v. Suddarth*, No. M1998-00920-COA-R3-CV, 2001 WL 196982, at *10 (Tenn. Ct. App. Feb. 28, 2001) (No Tenn. R. App. P. 11 application filed) citing *Gentry v. Hill* (no docket no.) 1985 Tenn. App. LEXIS 3180, at *6-11 (Tenn. Ct. App. Sept. 25, 1985) (No Tenn. R. App. P. 11 application filed). When one is trying to set aside or reform a written instrument then fraud must be proven by clear and convincing evidence. *Jarmakowicz*, 2001 WL 196982, at *10. See *Estate of Acuff v. O’Linger*, 56 S.W.3d 527, 530-31 (Tenn. Ct. App. 2001) (distinguishing *Jarmakowicz* since case at bar dealt with setting aside acknowledged deeds). Where witnesses contradict each other, if one witness’s testimony is believed by the factfinder, then the credible witness’s testimony is sufficient to establish fraud. *Id.* at 11.

We believe that the record establishes Mr. Christiansen committed promissary fraud by both the preponderance and the clear and convincing standards of evidence. Mr. Christiansen agreed to split the profits with Mr. Noblin to acquire Lot 1 then disregarded the agreement entirely. As discussed earlier, simply failing to comply with a promise does not alone establish Mr. Christiansen did not intend to comply when he made the agreement. Mr. Christiansen, however, took action at the time he made the agreement that evidences his intent not to comply.

Mr. Christiansen altered the contract for sale of Lot 1 so he could take title without regard to Mr. Noblin or his interests. Almost immediately after Lot 1 was closed in Mr. Christiansen’s name alone, Mr. Christiansen told the attorney who was working on the agreement between Mr. Noblin and himself to cease work on it. However, Mr. Christiansen told Mr. Noblin that work on their written agreement was progressing. These facts are evidence that Mr. Christiansen did not intend to comply with his promise to split the profits with Mr. Noblin and took action to deceive Mr. Noblin into believing Mr. Christiansen was complying.

Thereafter, Mr. Christiansen continued to disregard his promise to Mr. Noblin as the project progressed. Mr. Christiansen used the house on Lot 1 after its completion as his personal property and denied that Mr. Noblin had any interest in the property or the profits resulting from it. From this

evidence a trial court could easily conclude that Mr. Christiansen did not intend to comply with his agreement with Mr. Noblin at the time the promise was made.

The entire course of conduct by Mr. Christiansen, especially viewed in light of the trial court's credibility finding, leads to the inescapable conclusion that Mr. Christiansen used his false promises and misrepresentations to extract from Mr. Noblin not only his rights to Lot 1 but also the labor and care Mr. Noblin took with the development of Lot 1.

The evidence also supports the conclusion that Mr. Noblin acted in reliance on this agreement. He gave Mr. Christiansen the contract to purchase Lot 1 and allowed Mr. Christiansen to handle the closing, believing the property would be owned by his "partner" or the joint venture. Mr. Noblin worked on the Lot 1 project, took particular care on the project and spent much of his time there in his off hours. He worked there even during his resignation from Chadwick Homes. While Mr. Christiansen maintains the arrangement changed when Mr. Noblin was hired to work on other projects, the trial court found Mr. Christiansen's explanations were not credible. Therefore, we are left with Mr. Noblin proceeding to work on the Lot 1 home believing their arrangement to split profits remained in effect. Mr. Noblin's reliance was reasonable under all the circumstances.

Since Mr. Noblin had personally obtained the right to purchase Lot 1 Anatole, he could have developed the lot and recouped all of any profit. Instead, he agreed to split the profit in exchange for Mr. Christiansen's contracting experience.

The trial court did not find these two men had a misunderstanding about their agreement. Rather, the trial court found Mr. Christiansen made a promise to Mr. Noblin about splitting profits that he never intended to keep which was "clearly fraudulent." We agree.

VII. DAMAGES

Mr. Christiansen argues on appeal that even if Mr. Noblin is entitled to recover one-half of the profit from the development of Lot 1, "the calculations made by the Circuit Court did not fairly comport to the evidence presented at trial."

The trial court initially determined that the sale of the Lot 1 home yielded \$125,092.82 in profit. Later, the trial court reduced this amount by \$19,000 representing costs Mr. Christiansen incurred to sell the home, including real estate commissions and document charges. The trial court refused to reduce the profit by other expenses incurred by Mr. Christiansen "because Mr. Noblin did not have an opportunity to agree to incur these charges." These expenses include financing charges, selling bonus, title work, home buyers warranty, taxes, and some improvements or upgrades attributable to Mr. Christiansen's decision to live in the house. The finance charges relate to Mr. Christiansen's decision to refinance the house when he occupied it..

Mr. Christiansen appeals seeking to reduce the compensatory damage award by one-half of these expenses. We agree with the trial court that since Mr. Noblin was deprived of an opportunity to participate in the decisions to incur these expenses, to allow Mr. Christiansen to live in the home

for a long period and take it off the market, and to rent the home, Mr. Christiansen may not now attempt to have Mr. Noblin share in the expenses.

Finally, Mr. Christiansen argues that the punitive damage award should be set aside since the trial court's order "did not clearly set forth the reasons for the award for punitive damages based on the factors identified by the Supreme Court in *Hodges v. Toof*, 833 S.W.2d 896, 901-02 (Tenn. 1992)." After examining the factors in *Hodges*, the trial court's order and the evidence presented, including Mr. Christiansen's financial statement, we find the evidence supports the finding.

IV. CONCLUSION

We affirm the trial court's findings of fraudulent conduct and breach of the parties' oral contract. Costs of this appeal are assessed against Mr. Christiansen for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE